

## DEPARTMENT OF INDUSTRIAL RELATIONS

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November 17, 1999

Mr. Bill Quisenberry  
Center for Contract Compliance  
4399 N. Santa Anita Avenue, Suite 205  
El Monte, CA 91731

Re: Public Works Coverage Determination Case No. 99-039  
Riverview Business Center Office Building D

Dear Mr. Quisenberry:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to 8 California Code of Regulations (CCR) section 16001(a). Based upon my review of the documents submitted and the applicable laws and regulations pertaining to public works, it is my determination that this is a "public work" within the meaning of Labor Code sections 1720(a) and 1771.<sup>1</sup>

This project entails a complex land swap arrangement among the El Monte Community Redevelopment Agency ("Agency"), the County of Los Angeles ("County"), M-O Inland Empire-Arcadia, LLC ("M-O"), and Penske Automotive Group ("Penske"). Agency contracted with M-O to purchase a parcel of land in Arcadia ("Arcadia Parcel") owned by M-O. This agreement provided that M-O would construct a 35,878 square foot office building on the property, and would sell the improved property to Agency for the sum of \$4,179,787.00. Agency and County entered into an Agreement for the Exchange of Real Property which provided that Agency would transfer the Arcadia Parcel to County in exchange for a County-owned parcel in El Monte ("County Parcel").

Agency entered into a Disposition and Development Agreement ("DDA") with Penske, which provided that Penske would bear the cost (up to a maximum of \$4,200,000.00) of Agency's acquisition of the Arcadia Parcel in return for the conveyance to Penske of the County Parcel. Penske is to use the County Parcel for the expansion of its automobile dealership, presently located on adjacent property.

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<sup>1</sup> Subsequent statutory references are to the Labor Code unless otherwise indicated.

Section 1720(a) defines "public works" in pertinent part as: "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds . . ."

Agency contends that this project does not fall within section 1720(a). Agency first asserts that:

The property transfers will be accomplished by a common escrow so that title to the Arcadia Parcel will go directly from M-O Inland, after completion of the building, to the County and title to the County Parcel will go directly to Penske.

The CRA does not own the Arcadia Parcel. The CRA has not contracted, or in any manner dealt with M-O Inland's contractor (Sterling) regarding the construction of the building on the Arcadia Parcel. (Letter of August 30, 1999 from J. Robert Flandrick, Esq. to Division of Labor Statistics and Research.)

These facts are not dispositive. Section 1720(a) requires that the construction be done under contract, but it does not require that a public entity either own the subject property or be a party to a construction contract.<sup>2</sup>

Agency also argues that the project is not a public work because: "[T]he construction on the property is not being funded by public monies. Indeed, the construction is funded by Penske."

Agency reads section 1720(a) too narrowly. The statutory phrase "paid for in whole or in part out of public funds" was interpreted in *McIntosh v. Aubry* (1993) 14 Cal.App.4<sup>th</sup> 1576, 1588, 18 Cal.Rptr.2d 680. The court relied on a dictionary definition of "payment" as "the performance of a duty promise, or obligation . . . by the delivery of money or other value . . ." (*Ibid.*, quoting *Black's Law Dict.* (6<sup>th</sup> ed. 1990, p. 1129.) The court noted that under section 1720(a), the payment must be "out of public funds:"

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<sup>2</sup> Precedential Public Works Decision on Administrative Appeal, #93-039, Valley Rose Estates Project, City of Wasco August 26, 1995; Precedential Public Works Decision on Administrative Appeal, # 4-034, City of Pismo Beach Redevelopment Agency (Factory Outlet Center), February 28, 1995; Precedential Public Works Decision on Administrative Appeal, #93-012, Wal-Mart Shopping Center, City of Elsinore, July 1, 1994.

The word "funds" is not specifically defined in the statute but "has a well-established meaning in common parlance . . . . The dictionary defines it as 'available pecuniary resources ordinarily including cash and negotiable paper' [citation], and in a legal context the courts have also taken it to include property of value which may be converted into cash [citations]." (*Ibid.*, quoting *Keene v. Keene* (1962) 57 Cal.2d 657, 663, 21 Cal.Rptr. 593.)

Here Agency agreed to purchase the Arcadia Parcel upon completion of specified improvements,<sup>3</sup> the cost of which was included in the purchase price of \$4,179,787.00. If Agency were to pay this sum directly to M-0, clearly the construction would be paid for out of public funds. It makes no difference that the monetary payment flows instead from Penske, since Penske receives in return the El Monte Parcel, recognized by the parties to be of equal value to the improved Arcadia Parcel.<sup>4</sup> Thus, in reality, Agency is paying Penske with the County Parcel for the cost of construction on the Arcadia Parcel. The County Parcel is public property that may be readily converted into cash, as demonstrated by the purchase price established in the DDA between Agency and Penske. Under the *McIntosh* analysis, such payment for construction with public property constitutes payment out of public funds.<sup>5</sup>

Moreover, the project does entail direct expenditure of public monies. Agency agreed to pay \$280,000.00 as its share of County's relocation costs, and "the additional sum of \$720,000.00 representing the Agency's share of the cost of relocation of Utilities serving the Site, the Penske Properties and the Project Area . . . ." (DDA, section 10.D.)

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<sup>3</sup> Agency additionally agreed to cause those improvements to be constructed at no cost to County. (Agreement for Exchange of Real Property, section 2.6.)

<sup>4</sup> See Agreement for Exchange of Real Property, recitals, p. 2

<sup>5</sup> This is not a liberal interpretation of section 1720. In *McIntosh*, *supra*, 14 Cal.App.4<sup>th</sup> at 1589, the court emphasized that it was adhering to the plain meaning of section 1720, and declined to adopt a more expansive interpretation that would treat forbearance of rent as a payment out of public funds.

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For the reasons set forth above, construction of Riverview Business Center Office Building D on the Arcadia Parcel was paid for out of public funds within the meaning of section 1720(a). Therefore, consistent with the *McIntosh* decision, this project is a "public work" subject to the Labor Code's prevailing wage requirements.

Sincerely,

A handwritten signature in cursive script, reading "Stephen J. Smith".

Stephen J. Smith  
Director

cc: Daniel M. Curtin, Chief Deputy Director and Acting Chief, DLSR  
Henry P. Nunn, III, Chief, DAS  
Marcy Vacura Saunders, Labor Commissioner  
Vanessa L. Holton, Assistant Chief Counsel  
J. Robert Flandrick, Esq.